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No. 97-2050

In The

Supreme Court of the United States

October Term, 1997

RONALD GRABOSKI, RICHARD BELLANZA, EDWARD HANDIBODE, RICHARD GLEASON, GEORGE GIOVINAZZO, STEPHEN GIBBONS, *et al.*,

Petitioners,

vs.

RUDOLPH GUILIANI, Mayor of the City of New York and as a member of the Board of Trustees of the Firemen's Variable Supplements Fund and Fire Officers Variable Supplements Fund, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF COAPP-VSF, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND BRIEF *AMICUS CURIAE*

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MOTION OF COAPP-VSF, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

COAPP-VSF, INC. ("COAPP")[1], hereby moves, pursuant to Rule 37.2 for leave to file a brief *amicus curiae* in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. Respondents Uniformed Fire Officers Association and Uniformed Firefighters Association, as well as the Municipal respondents, have consented to the filing of this brief, but petitioner has declined to consent to the filing of this brief. A copy of the proposed amicus brief is attached.

As is more fully explained in the attached brief under "Statement of Interest", COAPP represents the interests of approximately 6,000 former firefighters and fire officers of the New York City Fire Department, who retired from the Fire Department on a "service" pension and are collecting a VSF benefit in addition to their "service" pension benefits. COAPP is well suited to address the Contract Clause claim raised in the petition. COAPP seeks to file the proposed brief and believes the brief can assist the Court for at least two reasons.

First, the VSF benefit is the result of more than twenty-five (25) years of good faith collective bargaining between the City of New York and the labor organizations representing firefighters and fire officers (hereafter collectively referred to as "firefighters"). By this lawsuit, petitioners seek to undo those twenty-five (25) years of collectively bargained benefits, thereby

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1. The acronym COAPP stands for "Coalition to Protect and Preserve" the VSF. This brief was authored by the amicus and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No one other than the amicus and its counsel made any monetary contribution to the preparation or submission of this brief.

unraveling the finality of the collective bargaining between the City of New York and its firefighters, and undermining the collective bargaining process in the public sector. Further, petitioners' argument that the collective bargaining agreements between the City of New York and its firefighter unions created contractual rights for them in the VSF benefit ignores the clear meaning of those agreements.

Second, the financial cost to the City of New York to provide petitioners with the VSF benefit would be staggering to say the least. Currently, the VSF benefit is $7,000 per retiree per year and increases to $12,000 per year in 2007. The City of New York would have to fund the annual benefit for approximately an additional 6,000 firefighter disability retirees. In addition, to the extent that the enabling legislation is found to be invalid or unconstitutional, the City of New York is entitled to reduce or stop longevity payments to active firefighters and/or VSF benefits to "service" retirees. The adverse financial impact on "service retirees" should petitioners prevail, would likewise be staggering.

It is respectfully requested that the Court grant leave to file the attached brief of the COAPP amicus.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

Amicus curiae, COAPP-VSF, INC. ("COAPP"), is a New York Not-For-Profit Corporation formed under the New York Not-For-Profit Corporation Law. COAPP has no parent or subsidiary companies. COAPP was formed for the purposes of defending the Variable Supplement Fund (**"VSF"**) payments paid to "service" retirees from the New York City Fire Department. There are approximately 1,100 retired firefighters and fire officers who actively support COAPP. COAPP was formed by a group of "service" retirees in response to the complaint filed by petitioners in this action. There are currently approximately 12,000 firefighter retirees from the New York City Fire Department. Approximately 6,000 are retired on a disability and are not receiving VSF benefits. The other 6,000 retirees retired based on years of service ("service retirees") and they are receiving VSF benefits.

The VSF benefit is the result of collective bargaining between the City of New York and the labor organizations representing firefighters and fire officers (hereafter collectively "firefighters"). The 1968-70 collective bargaining agreements between the City of New York and its firefighter unions created the VSF fund and provided for the parties to mutually sponsor and submit legislation which would implement the VSF benefit. In 1972, there was corrective legislation which made clear that only "service" retirees were entitled to VSF payments.

The 1987-90 collective bargaining agreement changed the VSF benefit from an undetermined amount, contingent on investment performance, to a fixed guaranteed benefit culminating in an annual benefit of $12,000 per retiree in the

year 2007. Both the 1987-90 collective bargaining agreement for the Uniformed Firefighters Association ("UFA") and the implementing legislation, Chapter 583 of the Laws of New York of 1989 (§26), which together led to the current defined benefit form of the VSF, provide that in the event that any provision of Chapter 583 of the Laws of New York of 1989 (other than section 13 or section 17) is overturned by a court of competent jurisdiction , the City of New York is entitled to reduce or stop longevity payments to active firefighters and to reduce or stop VSF benefits to "service" retirees. In essence, this means that if the petitioners prevail in this action, the VSF benefit currently provided to "service" retirees may cease while the firefighter unions and the City of New York negotiate the impact.

A decision of this court in favor of the petitioners would have an adverse impact on the interests of the "service" retirees since their VSF benefits may cease or be reduced. COAPP submits that it is therefore well suited to brief the court on the importance of this issue. The potentially devastating financial effect of a decision in favor of petitioners on "service" retirees is beyond the immediate concerns of the parties and should properly be briefed by amicus curiae.

In addition, the petitioners, by this lawsuit, are attempting to undue over twenty-five (25) years of good faith collective bargaining between the City of New York and its firefighter unions. Negotiation of a labor contract is an event which has a significant impact on the employer whose contract is being negotiated, as well as on the employees and their families. In this case, the impact extends to the residents and tax payers of New York City as well.

The firefighters who formed COAPP worked under a number of successive collective bargaining agreements between the City of New York and their respective unions. Each

agreement reached was, as in all labor negotiations, the result of hard fought bargaining and realistic compromise where necessary. Negotiating better medical or other benefits necessarily means getting less elsewhere. The goal of the union is, of course, to get the maximum amount from the employer in terms of wage increases, medical benefits, pension benefits and other improved terms and conditions of employment. The employer, on the other hand, seeks to keep labor costs as low as possible. Here, the UFA and the United Fire Officers Association ("UFOA") negotiated VSF benefits which, over the years, went from an undetermined amount contingent on investment performance to a fixed guaranteed benefit which will culminate in an annual benefit of $12,000 per retiree in the year 2007. Each time the firefighter unions negotiated an improvement in the VSF benefit, they implicitly gave up a financial gain elsewhere. So, when the VSF benefits were improved for "service" retirees, the firefighters who would retire on service pensions were foregoing other improvements in the terms and conditions of their employment.

The implications to the City for benefit improvements are likewise important. Does the VSF benefit cover 6,000 retirees or 12,000 retirees? The financial implications are staggering to say the least. If the petitioners succeed in this suit, how will the City of New York fund double the benefits? Likewise, what will become of the VSF payments guaranteed to the current VSF recipients, and what will become of the morale of current firefighters near retirement if they are told the VSF has been eliminated or cut in half?

The finality of collective bargaining is of the utmost importance to employers, unions and employees alike. This is especially so in the public sector where the taxpayer is the ultimate source of revenue. The petitioners in this case seek to undue twenty-five (25) years of collectively bargained benefits.

The record is clear that petitioners' collective bargaining representatives agreed to leave wide discretion on the details of the VSF benefit to the New York legislature and the New York Court of Appeals has confirmed same. At this late point, certain retirees who were clearly and properly excluded from the VSF program wish to ignore the bargaining history and ask for more benefits years after negotiations have closed. COAPP brings this important policy issue to the Court's attention and respectfully urges this Court to deny the petition. Petitioners have failed to provide adequate reasons as set forth in Rule 10 of the Court's rules for the Court to grant certiorari. As amicus curiae, COAPP will only address petitioners' Contract Clause Claim.

ARGUMENT

I

PETITIONERS DO NOT HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO VSF BENEFITS.

The petitioners' Contract Clause[1] claim is premised on the erroneous belief that the 1968 and 1970 collective bargaining agreements ("CBAs") between the City of New York and the Uniformed Firefighters Association ("UFA") and the Uniformed Fire Officers Association ("UFOA") created a contractual right to VSF benefits for them. In applying the limitations of the Contract Clause to the police power of the state, "the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship". *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 (1978). The Plaintiffs have not met their burden of showing that the CBAs give them a contractual right to VSF benefits.

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1. U.S. Constitution, Art. 1, §10, I. 1 ("No State shall . . . pass any . . . Law impairing the obligation of Contracts . . .").

The 1968/70 CBAs were the first step in the creation of the VSF benefit. Both the UFA agreement (A. 323, 373) and the UFOA agreement (A. 287) provided that creation of the VSF Fund was subject to legislative approval. Furthermore, Article VII, section 2 of the UFA agreement expressly provided:

> Notwithstanding the provisions of this Article the provisions of such legislation shall be deemed to have implemented and shall supersede the provisions of this Article, and no rights shall accrue under the provisions of this Article different from or in addition to the rights accruing under such legislation. If such legislation is adopted, any dispute concerning the interpretation and/or application of the provisions of this article, shall not be subject to the dispute adjustment or grievance procedures set forth in this Contract.

(A. 323)

The Second Circuit, relying on *Castellano v. Board of Trustees of Police Officers Variable Supplements Fund*, 937 F.2d 752 (1991), *cert. denied*, 502 U.S. 941 (1991), disposed of petitioners' contention that they were entitled to VSF benefits by virtue of the CBAs. In *Castellano*, the Second Circuit held that the CBA did not establish contractual rights to VSF benefits, but merely set up a "supplemental pension fund" for the purpose of providing a supplemental benefit on a variable annuity basis as determined by the trustees. The collective bargaining agreement created a fund, but it did not establish who the beneficiaries of that fund were. That step, the final step in the creation of the VSF benefit, was the implementing legislation which determined who were the VSF beneficiaries. *Id.* at 757. The *Castellano* panel then concluded its discussion of the Contract Clause claim by noting "since we find absolutely no

impairment of the City's obligations under the collective bargaining agreement, there is no contract clause "hurdle" to leap and our inquiry ends." *Id.* Likewise, for the petitioner firefighters here, there is no need for a contract claim analysis on the severity of the contract impairment under *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S. Ct. 2716 (1978), because there is absolutely no impairment of the City's contractual obligations with either the UFA and/or the UFOA.

In *Schacht v. City of New York*, 39 N.Y. 2d 28, 382 N.Y.S. 2d 717 (1976), the New York Court of Appeals held that any rights which a former civil servant might have had under a prior pension plan were waived by an agreement made by her collective bargaining representative and by her own actions in accepting benefits of the new plan. There, the union reached agreement with the City that plaintiff's position was not covered by the union contract and hence covered by a different pension plan. Having designated the union to be her agent for collective bargaining purposes, Ms. Schacht was bound by the agreement made by her union on her behalf. An employee may not reject certain acts of her bargaining representative and accept others. *Matter of New York Times Co. [Newspaper Guild of New York]* 2 A.D. 2d 31, 33, 152 N.Y.S. 2d 884.

Here, petitioners are bound by the actions of their unions in agreeing to let the legislature implement the VSF program and determine its beneficiaries. Further, they have accepted without protest wage and benefit improvements from 1968/70 to the date of their retirement and they elected to receive disability pensions when they could have taken "service" pensions. They cannot now reject certain actions of their unions.

In *Ballentine v. Koch*, 674 N.E. 2d 292 (N.Y. 1996), retired New York City police officers challenged the 1988 legislation changing the funding method and payment structure of the

police department VSF benefit. The police VSF benefit is similar to the VSF benefit at issue in this case. (A. 707). Prior to their state court action, the *Ballentine* plaintiffs filed an action in the Southern District of New York alleging that the 1988 changes to the police VSF violated their due process rights and constituted an unconstitutional impairment of their federal and state contract rights. The district court dismissed the due process claims on the merits and subsequently dismissed the remainder of the action on abstention grounds, holding that the federal Contract Clause claim would require the court to determine whether the original legislative enactment created a contractual obligation under State law, an issue that the federal court recognized had not yet been decided by the New York Court of Appeals. The *Ballentine* plaintiffs then filed their state court action, asserting claims under the federal Contract Clause and the Pension Impairment Clause (article V, §7) of the New York State Constitution.

Notwithstanding the express provisions of the police VSF implementation legislation defining the police VSF as not being a pension or retirement system and hence outside the protection of New York's constitutional protection for pensions (article V, §7), the *Ballentine* plaintiffs argued that public policy demanded that their VSF benefits be within the scope of article V, §7, based on evidence of the negotiating process that led to the 1970 legislation. The New York Court of Appeals found that neither the history of the negotiating process that led to the 1970 legislation nor public policy supported plaintiffs' claims. The Court did not find any public policy violation in this waiver of the pension clause shield. Indeed, the Court found the waiver a virtual necessity to the arrangement. There was a need "to foreclose a constitutional challenge whenever the . . . regular Pension Fund benefits were increased," for the reason that every such increase would leave less excess for investment in the VSF and allow the VSF beneficiaries to challenge increases in the

regular pension. *Ballentine*, *Id.* at 296. Thus, designation of the VSF as a nonpension benefit was necessary for its creation.

The Second Circuit, in *Castellano*, held that where the collective bargaining agreement is silent or lacks clarity on an issue, it will look to the implementation legislation. *Castellano* at 757. "[W]here the statute speaks with clarity, the statute is the safe guide through the arcane area of public employees' pension rights." *DiGiacomo v. City of New York*, 58 A.D. 2d 347, 362, 397 N.Y.S. 2d 632, 642 (1977) Silverman, J., *dissenting in part, rev'd*, 46 N.Y. 2d 894, 414 N.Y.S. 2d 690 (1979) (based on Justice Silverman's dissenting opinion). As in *Ballentine* and *Castellano*, the implementation legislation for the firefighter VSF makes clear that petitioners are not entitled to VSF payments.

Furthermore, in response to the *Ballentine* plaintiffs' contention that they never specifically ratified the pertinent language in approving the contract, the Court of Appeals held that they failed to demonstrate that their union, the PBA, was acting outside the scope of its representational authority in agreeing to the statutory provisions at issue. Thus, they were bound by the PBA's actions taken on their behalf during the negotiation process. *Ballentine* at 296. (*see Schacht v. City of New York*, 39 N.Y. 2d 28, 382 N.Y.S. 2d 717 (1976). The agreement of the firefighter unions (UFA and UFOA) that enactment and implementation of the VSF benefits is subject to legislative approval effectively waived the petitioners' claim that the CBA entitled them to pension benefits when the implementing legislation says otherwise. Further, the board of trustees created to administer a VSF Fund is given broad discretion concerning the manner and amount of disbursements of VSF funds to eligible beneficiaries. (*see generally*, *Poggi v. City of New York*, 109 A.D. 2d 265, *aff'd*, 67 N.Y. 2d 794 (1906).

Section 2 of Article VII of the 1968 UFA agreement with the City (A. 323) further undermines Plaintiffs' argument that the CBA entitled them to pension benefits. Section 2 expressly provides that the implementation legislation mutually sponsored and agreed to by the union and the City supersedes the provision of the CBA and no rights shall accrue under the provisions of the CBA different from or in addition to the rights accrued under such legislation. Section 2 goes on to provide that any dispute concerning the interpretation and/or application of the provisions of the pension article is not subject to the dispute adjustment or grievance procedures in the agreement. The UFA agreement defines a "grievance" as a complaint arising out of claimed violations, misinterpretations or inequitable application of the provisions of this Contract or of existing policy or regulations of the Department. [*see* Article XV. 'Grievance Procedure' of UFA Contract (A. 293)]. It is a basic tenet of the law of collective bargaining/labor-management relations that a grievance procedure is for the adjustment or resolution of disputes arising under the agreement. Here, the UFA's waiver of the right to grieve pension (including VSF) disputes, and acknowledgment that the contract creates no rights greater or in addition to those in the implementing legislation, establishes beyond a doubt that the petitioners have no contractual rights under the CBA to VSF payments.

Petitioners' reliance on *Board of Education v. Buffalo Teachers Fed.*, 89 N.Y. 2d 370, 653, 675 N.E. 2d 1202 (N.Y. Ct. App. 1996), and *Ass'n of Surrogates v. State of New York*, 940 F.2d 766 (2nd Cir. 1991) is misplaced. In both cases, there was a clear and unambiguous contractual obligation being challenged. The New York Court of Appeals refused to allow the Buffalo Board of Education to encumber and avoid its contractual obligation to the teachers union under the guise of legislative activity. Likewise, in *Ass'n of Surrogates*, the Second Circuit, relying on a determination of the New York Court of

Appeals that the compensation obligation of the employer to its union was a valid and binding obligation not subject to or conditional upon annual legislative appropriations, held that New York's "lag-payroll" law impaired the state's contract obligation and violated the Contract Clause because said impairment did not satisfy the rational-basis test.

CONCLUSION

In summary, petitioners' Contract Clause claim must fail because they are unable to sustain their burden of showing that the CBA's gave them a contractual right to VSF benefits. Both the New York Court of Appeals and the Second Circuit Court of Appeals have concluded after extensive litigation over the VSF benefit, that it is not a contractual obligation under the CBA's between the City of New York and its police and firefighter unions.

Amicus curiae submits that the petition for a writ of certiorari should be dismissed.

Respectfully submitted,

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